Galland Enterprise Sdn Bhd & Ors v Supermix Concrete (East Malaysia) Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–5 OF 2005-II
LAU BEE LAN J
21 FEBRUARY 2006

Civil Procedure — Appeal — Notice of appeal — Whether service of record of appeal with notice of appeal suffice — Subordinate Court Rules 1980 O 1(A), O 2 r 3

Civil Procedure — Judgments and orders — Order made by court — No sealed order in the record of appeal — Whether draft order was sufficient — Whether substantial miscarriage of justice caused to the respondent — Subordinate Court Rules 1980 O 1(A), O 2 r 3 and O 49 r 6(3)(d)

Civil Procedure — Pleadings — Striking out counterclaim and defence to counterclaim — Principles applicable — Whether claim or answer was on the face of it 'obviously unsustainable' — Subordinate Court Rules 1980 O 14 r 21

Civil Procedure — Pleadings — Striking out defence and counterclaim — Whether court could only look at defence and counterclaim in considering application to strike out pleading — No reasonable defence and cause of action disclose

This was an appeal by the first, second and third appellants ('first, second and fourth defendants' or 'the defendants' as the case may be) against the decision of the learned sessions court judge allowing the respondent's ('plaintiff') application pursuant to O 14 r 21 of the Subordinate Court Rules 1980 ('the SCR'), inter alia, for an order that the defence and counterclaim of the first, second and fourth defendants be struck out and judgment be entered against the first, second and fourth defendants as prayed for in the statement of claim. At the outset, the plaintiff's counsel raised the following preliminary objections: (1) although they had been served with the record of appeal, no notice of appeal was properly served on them in conformity with O 49 r 6 of the Subordinate Courts Rules 1980; (2) there was no proper appeal before the court in that the record of appeal did not contain the sealed order and therefore the plaintiff would not know against what order the defendants were appealing against; instead what was in the record of appeal was merely the draft order signed by both parties but not the registrar.

Held, allowing the appeal with no order as to costs:

(1) By virtue of O 1(A) and O 2 r 3 of the SCR, the court was to consider the

preliminary objection raised by the plaintiff and see whether the non-compliance by the defendants in effecting proper service of the notice of appeal and in not filing the 'approved' draft order had occasioned a substantial miscarriage of justice (see para 5).

(2) There should have been a proper service of the notice of appeal on the plaintiff. However, the failure of the defendants to do so had not prejudiced nor resulted in any substantial miscarriage of justice to the plaintiff because the plaintiff had acknowledged receipt of the record of appeal and therefore the plaintiff was deemed to know that there was an appeal pending (see para 5).

(3) Since the draft order had not been approved by the Registrar of the Subordinate Courts, it could not constitute a proper draft order within the meaning of O 49 r 6(3)(d) of the SCR. Be that as it may, the draft order had been amended by the firm of the plaintiff's counsel. Further, the plaintiff's counsel did not deny he was present together with the defendants' counsel in the sessions court on 27 January 2005 to obtain the ruling made by the learned sessions court judge. Therefore, the non-compliance by the defendants had not caused any prejudice or substantial miscarriage of justice to the plaintiff and the contention of the plaintiff's counsel that the plaintiff was not aware of the order appealed from by the defendants should not be sustained (see para 5).

(4) In considering an application under O 18 r 19(1)(a) of the Rule of the High Court 1980 ('RHC'), the court can only look at the statement of claim. The court should not pay any attention to evidence in the form of affidavits. Looking at the pleadings, prima facie, the defence and counterclaim could not be said not to disclose a reasonable cause of action (see paras 8–9).

(5) The striking out of the defence and counterclaim by summary procedure is a drastic cause of action. Following the case of *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, this was not a case where on the face of it, the claim of the defendants was 'obviously unsustainable' but the court was satisfied that there was a reasonable cause of action and that there were arguable defences (see para 14).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu-perayu pertama, kedua dan ketiga ('defendan-defendan pertama, kedua dan keempat' atau 'defendan-defendan' mengikut keadaan) terhadap keputusan hakim mahkamah sesyen yang bijaksana yang telah membenarkan permohonan responden ('plaintif') menurut A 14 k 21 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), antara lain, untuk satu perintah bahawa pembelaan dan tuntutan balas defendan-defendan pertama, kedua dan keempat dibatalkan dan penghakiman dimasukkan terhadap defendan-defendan pertama, kedua dan keempat seperti yang dipohon dalam penyataan tuntutan. Pada mulanya, peguam plaintif telah menimbulkan bantahan-bantahan awal berikut: (1) meskipun mereka telah diserahkan rekod rayuan, tiada notis rayuan diserahkan dengan betul ke atas mereka mengikut A 49 k 6 Kaedah-Kaedah Mahkamah Rendah 1980; (2) tiada rayuan betul di hadapan mahkamah di mana rekod rayuan tidak mengandungi perintah bermeterai dan oleh itu plaintif tidak mungkin mengetahui perintah apa yang defendan-defendan sedang merayu terhadap, sebaliknya apa yang

A tertera dalam rekod rayuan hanyalah draf perintah yang ditandatangani oleh kedua-dua pihak dan bukan pendaftar.

Diputuskan, membenarkan rayuan tanpa memerintahkan sebarang kos:

B (1) Menurut A 1(a) dan A 2 k 3 KMR, mahkamah perlu menimbangkan bantahan awal yang ditimbulkan oleh plaintif dan melihat sama ada ketidakpatuhan oleh defendan-defendan melaksanakan penyampaian yang sempurna terhadap notis rayuan itu dan dengan tidak mengisikan draf perintah yang 'diluluskan' menyebabkan keadilan tidak dilaksanakan (lihat perenggan 5).

C (2) Sepatutnya ada penyampaian yang sempurna terhadap notis rayuan ke atas plaintif. Namun, kegagalan defendan-defendan untuk berbuat demikian tidak memprejudiskan maupun mengakibatkan apa-apa ketidakadilan berlaku kepada plaintif kerana plaintif telah mengakui penerimaan rekod rayuan itu dan oleh demikian plaintif dianggap telah mengetahui bahawa terdapat rayuan D yang belum selesai (lihat perenggan 5).

(3) Memandangkan draf perintah tidak diluluskan oleh Pendaftar Mahkamah Rendah, ia tidak membentuk draf perintah yang sempurna dalam maksud A 49 k 6(3) KMR. Jikapun begitu, draf perintah itu telah dipinda oleh firma peguam plaintif. Bahkan, peguam plaintif tidak menafikan beliau hadir E bersama peguam defendan-defendan di mahkamah sesyen pada 27 Januari 2005 untuk mendapatkan keputusan oleh hakim mahkamah sesyen yang bijaksana. Oleh itu, ketidakpatuhan oleh defendan-defendan tidak menyebabkan apa-apa prejudis atau ketidakadilan kepada plaintif dan hujah peguam plaintif bahawa plaintif tidak sedar yang perintah itu dikemukakan F untuk rayuan daripada defendan-defendan tidak patut dikekalkan (lihat perenggan 5).

(4) Dalam mempertimbangkan suatu permohonan di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), mahkamah hanya melihat penyataan tutntutan. Mahkamah tidak perlu menghiraukan keterangan dalam G bentuk afidavit. Melihat rayuan tersebut secara prima facie, pembelaan dan tuntutan balas itu tidak boleh dikatakan tidak menunjukkan kausa tindakan yang munasabah (lihat perenggan 8–9).

(5) Pembatalan pembelaan dan tuntutan balas melalui prosedur terus adalah satu kausa tindakan yang drastik. Menurut kes *Bandar Builders Sdn Bhd & Ors v* H *United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, ini bukan merupakan satu kes di mana pada dasarnya, tuntutan defendan-defendan adalah'obviously unsustainable' tetapi mahkamah berpuas hati bahawa terdapat kausa tindakan yang munasabah dan bahawa terdapat pembelaan yang boleh dihujahkan (lihat perengan 14).]

I **Notes**

For cases on notice of appeal, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 1207–1212.

For cases on order made by court, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 3751–3757.

For cases on striking out counterclaim and defence to counterclaim, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 5059–5062.

Cases referred to

Abdul Rahim bin Abdul Hamid & 4 Ors v Perdana Merchant Bankers Bhd (dahulunya dikenali sebagai Intradagang Merchant Bankers (M) Berhad & 5 Ors [2000] 2 AMR 1319 (refd)

Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)

Legislation referred to

Rules of The High Court 1980 O 18 r 19(1)
Subordinate Court Rules 1980 O 1(A), O 2 r 3, O 14 r 21

Appeal from: Summons No 52–372 of 2004-III (Sessions Court, Kuching)

Mohd Ivan Hussein (Ivan Hussein Advocates) for the first, second and third appellants. Jonathan Chong (TC Chong & Co) for the respondents.

Lau Bee Lan J:

[1] This is an appeal by the first, second and third appellants/first, second and fourth defendants ('the first, second and fourth defendants' or 'the defendants' as the case may be) against the decision of the learned sessions court judge made on 27 January 2005 allowing the respondent's ('plaintiff') application with costs to be taxed unless agreed (encl 2). At the outset the learned counsel for the plaintiff, Mr Jonathan Chong, raised a preliminary objection: firstly, although they have been served with the record of appeal, no notice of appeal was properly served on them in conformity with O 49 r 6 of the Subordinate Courts Rules 1980 ('the SCR'); secondly, there was no proper appeal before the court in that the record of appeal did not contain the sealed order and therefore the Plaintiff would not know against what order the defendants are appealing against; instead what was in the record of appeal was merely the draft order at pp 118–119 signed by both parties but not the registrar.

[2] Mr Ivan Hussein, learned counsel for the first, second and fourth defendants replied that they had placed a copy of the notice of appeal in the pigeon hole of the firm of the plaintiff's counsel in the court house. Subsequent to that when they sought the assistance of the learned counsel to approve the draft order so that it could be incorporated into the record of appeal, the learned counsel did not say anything on the notice of appeal not being served on their firm; as such they were not aware that they have not received the notice of appeal and were under the impression that they were aware of the notice of appeal; subsequently, when they served the record of appeal on the plaintiff, again they had no indication they did not receive the notice of appeal or I that they objected to the record of appeal; otherwise they could make the necessary application to the court to extend or abridge time to redress any oversight on their part.

[3] To the court's query whether there is proof that the defendants have served the notice of appeal, Mr Ivan Hussein stated he had made a notation in his file copy of cover letter to court to the effect 'In pigeon hole at court house'. To the court's question whether the plaintiff was raising this as a preliminary objection, Mr Chong responded that the two points he has submitted on the competency of the appeal would be dealt with in the submission proper and to be fair, if the defendants needed to look into the matter, he had no objection to it. Mr Ivan Hussein requested for time and a new hearing date was fixed.

[4] On the date of hearing (28 October 2005), Mr Ivan Hussein informed the court that the defendants had filed a supplementary record of appeal dated 21 October 2005 enclosing that the record of appeal shall contain a copy of *the order or the draft order of the decision appealed from*. Mr Chong raised a preliminary objection on two points

(i) there was no proper service of notice of appeal served on the plaintiff; and

(ii) the record of appeal did not contain the sealed order.

[5] The draft order dated 27 January 2005 is at pp 118–119 of the record of appeal. Although the draft order has been amended by the plaintiff's counsel and both the plaintiffs and the defendants' counsel have signed the draft order, the said draft order has not been approved by the Registrar of the Subordinate courts. By virtue of O 1(A) and O 2 r 3 of the SCR, the court is to consider the preliminary objection raised by the plaintiff and see whether the non-compliance by the defendants in effecting proper service of the notice of appeal and in not filing the 'approved' draft order has occasioned a substantial miscarriage of justice. Mr Ivan Hussein had stated that he had placed the notice of appeal in the pigeon hole of the firm of the plaintiff's counsel in the court house and there is a notation in his file copy of cover letter to the court to the effect 'in pigeon hole in court house', I agree with Mr Chong that there should have been a proper service of the notice of appeal on the plaintiff. However, the failure of the defendants to do so has not prejudiced nor resulted in any substantial miscarriage of justice to the plaintiff because the plaintiff has acknowledged receipt of the record of appeal and therefore the plaintiff is deemed to know that there is an appeal pending. Since the draft order has not been approved by the Registrar of the Subordinate Courts, in my judgment, it cannot constitute a proper draft order within the meaning of O 49 r 6(3)(d) of the SCR. Be that as it may, I observe that the draft order has been amended by the firm of the plaintiff's counsel. Further, the plaintiff's counsel did not deny he was present together with the defendants' counsel in the sessions court on 27 January 2005 to obtain the ruling made by the learned sessions court judge. In this regard, I therefore find that the non-compliance by the defendants has not caused any prejudice or substantial miscarriage of justice to the plaintiff and the contention of the plaintiff's counsel that the plaintiff is not aware of the order appealed from by the defendants cannot be sustained. In the circumstances, the preliminary objection of the plaintiff is dismissed.

[6] The application by the plaintiff dated 11 November 2004 made pursuant to O 14 r 21 of the SCR is, inter alia, for an order that (i) that the defence and

counterclaim of the first, second and fourth defendants all dated 13 October 2004 be struck out and judgment be entered against the first, second and fourth defendants as prayed for in the statement of claim; (ii) that the plaintiff be given costs of this application; and (iii) such further or other orders this court sees fit. The grounds in support of the application are:

(a) that the defence and counterclaim disclose no reasonable defence and cause of action;

(b) that the defence and counterclaim are scandalous, frivolous or vexatious;

(c) that the defence and counterclaim may prejudice, embarrass or delay the fair trial of the action; or

(d) that the defence and counterclaim are otherwise an abuse of the process of the court.

[7] The legal proposition governing an application under O 18 r 19(1) of the RHC is enunciated in the Supreme Court case of *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 where the Supreme Court held at p 43:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC [which is in para materia to O 14 r 21 of the SCR] are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck &. Sons Ltd v Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors*).... The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[8] As far as the first ground in item (a) that the defence and counterclaim disclose no reasonable defence and cause of action, I refer to the authority of *Abdul Rahim bin Abdul Hamid & 4 Ors v Perdana Merchant Bankers Bhd (dahulunya dikenali sebagai Intradagang Merchant Bankers (M) Berhad & 5 Ors* [2000] 2 AMR 1319 where at p 1320 the Court of Appeal held:

> 7. In considering an application under O 18 r 19(1) (a) of the RHC the court can only look at the statement of claim. The court should not pay any attention to evidence in the form of affidavits. Therefore in the present case, the court should disregard the affidavits in considering the application under O 18 r 19(1)(a) of the RHC.

[9] Looking at the pleadings, I find that prima facie, the defence and counterclaim cannot be aid not to disclose a reasonable cause of action. In answer to the plaintiff's claim igainst the first defendant for the balance of goods sold and delivered, namely, concrete, the plaintiff has raised issues of short supply, overpayment, overcharging, the quantity of supply is subject to final measurement and the payment is back to back; and in respect of the claim against the second and fourth defendants they have

raised the defence that the obligation under the letter of guarantee dated 30 June 1999 (exh C) would only arise where the claim of the plaintiff against the first defendant becomes conclusive.

[10] As for the other grounds relied upon by the defendants in items (b), (c) and (d) above, the court following the case of *Abdul Rahim bin Abdul Hamid & 4 Ors v Perdana Merchant Bankers Bhd*, is entitled to examine the affidavit evidence and the exhibits (see Held (3) (a) at p 1321). Paragraph (2) of the statement of claim does not refer to any agreement in respect of the claim made by the plaintiff for balance of concrete sold and delivered to the first defendant but it merely states:

> It is a term of the contract of sale that interest at 1.5% per month shall be payable by the Defendant to the Plaintiff for all amount outstanding after the fourteen (14) days credit term and the fourteen (14) credit term for the goods supplied, the last batch of which having been made on 15th January 2004, expired on 29th January 2004.

[11] In the defence and counterclaim, the first defendant has put the plaintiff to proof as to particulars and breakdown of the plaintiff's claim (see para 2). In the affidavit in support of the application, the plaintiff averred that the concrete was sold and delivered to the first defendant pursuant to an agreement dated 28 October 2003 between the plaintiff and the first defendant (exh B) (see para 5). If indeed the concrete sold and delivered was pegged on to the said agreement as alleged by the Plaintiff, then why did they not in the first place plead the said agreement in the statement of claim? The terms and conditions contained in this agreement is material in this case and paragraph (iii) of the recital to the agreement states:

> The parties are desirous of settling existing accounts between them amicably and for the sub-contract works for the Project to be completed on the terms and conditions hereinafter contained.

[12] Therefore, it is evident that the case is not as straightforward as what the plaintiff wishes the court to believe since the supply and delivery of the concrete is made in the context of a running account as pleaded in para 4 of the defence and counterclaim which is fortified by para (iii) of the recital in the said agreement (exh B). Furthermore, the agreement does not provide for the payment of interest at 1.5% per month from 30 January 2004 until full and final payment as claimed by the plaintiff. Even though there has been acknowledgement on the delivery orders by the defendants, such delivery orders are not conclusive as to the amount of concrete supplied which is subject to final measurement but only as to delivery.

[13] The claim against the first, second and fourth defendants under the continuing guarantee can only be established if there is a case made out against the first defendant in the first place.

[14] The striking out of the defence and counterclaim by summary procedure is a drastic cause of action. I find that following the case of *Bandar Builders* this is not a

case where on the face of it the claim of the defendants is 'obviously unsustainable' but I am satisfied that there is a reasonable cause of action and that there are arguable defences.

[15] In the circumstances, I reverse the order of the learned sessions court judge and allow the appeal of the defendants but with no order as to costs due to the unsatisfactory conduct by the first, second and fourth defendants with respect to the procedural aspect of this appeal.

Appeal allowed.

Reported by K Krishnan